No. 96-460

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IN THE
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OCTOBER TERM, 1996

LIQUIDATION ESTATE OF
DE LAURENTIIS ENTERTAINMENT GROUP INC.,
Petitioner,

v.

TECHNICOLOR, INC.,
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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REPLY BRIEF FOR PETITIONER

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Respondent concedes that the circuits have "issued conflicting decisions" as to the proper application of pre-amended Section 546(a), and that the outcome of numerous avoidance actions brought in "pending pre-October, 1994 chapter 11 cases. . . may be determined" by the interpretation of former § 546(a). Respondent's Br. at 6, 8. These reasons alone warrant granting the Petition.

Respondent nonetheless asserts that certiorari should be denied because the 1994 amendment eliminates any ambiguity, and therefore any conflict, as to the proper application of the statute. Both the plain language and the legislative history of the 1994 amendment demonstrate that this assertion is incorrect.

Pre-amended Section 546(a) required an action to be brought within "two years after the appointment of a *trustee* . . . ," or before "the time the case is closed or

dismissed," whichever occurs earlier. 11 U.S.C. § 546(a); Petition at 5 (emphasis added). The word "trustee" is unchanged in the amended version of Section 546(a), which respondent conveniently ignores. As explained in the Petition, the circuits disagree over the proper construction of the word "trustee." Petition at 6-9.

Viewing the debtor in possession as the "functional equivalent" of a trustee, the Second, Third, Ninth and Tenth Circuits hold that the term "trustee" in pre-amended Section 546(a)(1) should be read to include the debtor in possession if no actual trustee has been appointed. Petition at 8-9. The effect of this construction is to require that an avoidance action be brought within two years after the "appointment of" the debtor in possession—i.e., within two years after the Chapter 11 petition is filed. 11 U.S.C. § 546(a)(1); Petition at 8-9.

In contrast, the Fourth and Seventh Circuits, applying the plain language of Section 546(a)(1), have held that the term "trustee" *cannot* be read to include the debtor in possession. Petition at 6-7. The effect of the Fourth and Seventh Circuits' construction where no actual trustee is appointed is not, as respondent suggests, to impose "no statute of limitations for preference actions," Respondent's Br. at i, but rather to require that an action be brought any time before the Chapter 11 case is "closed or dismissed." 11 U.S.C. § 546(a)(2); Petition at 6-7.

Amended Section 546(a)(1), which allows an action to be brought either "2 years after entry of the order for relief," or "1 year after the appointment or election of the *first trustee* . . . ," whichever is later, does not resolve this conflict. 11 U.S.C. § 546(a)(1) (emphasis added). Nothing in amended Section 546(a)(1) precludes the Second, Third, Ninth and Tenth Circuits from continuing to hold that the debtor in possession is the "first trustee." Indeed, the legislative history of the amendment states that the changes are "not intended to create any negative inference or implication regarding the status of current law or interpretations of section 546(a)(1)." 140 Cong. Rec. H10,767 (Oct. 4, 1994), *reprinted in*

Collier Pamphlet Edition, *Bankruptcy Code* 579 (Herzog & King eds. 1996) (statement of Rep. Brooks) (emphasis added).

This disagreement over the proper construction of the word "trustee" will continue to cause disparate treatment of similarly situated plaintiffs. Plaintiffs in the four circuits that construe "first trustee" to include the debtor in possession will be required to bring their claims, at the latest, two years after the "entry of the order for relief," 11 U.S.C. § 546(a)(1)(A), even if an actual trustee is appointed within that two-year period. In contrast, plaintiffs in the two circuits that do not construe "first trustee" to include the debtor in possession will have, as provided in subsection (a)(1)(B) of the amended statute, up to three years to assert their claims—i.e., one year after the appointment of the "first trustee" appointed during the first two years of the case. Petition at 12-13.

Finally, in arguing that "[n]o future conflict can arise on this point" under the new statute, Respondent's Br. at 10, respondent has effectively conceded that the Fourth and Seventh Circuits' plain-meaning construction of the pre-amended statute is correct, and that respondent's consistent assertion to the contrary is incorrect:

> The new statute could not be more clear: the action may not be brought—by a debtor in possession or anyone else—more than two years after the entry of the order for relief, unless a *trustee* has been appointed within that two-year period, in which case the limitations period runs to the later of the end of the two years or one year after the *trustee's* appointment.

Respondent's Br. at 10 (emphasis added). By asserting that the wording of the new statute "could not be more clear," respondent has, in effect, acknowledged that the term "trustee," whether in the amended or pre-amended statute, cannot reasonably be construed to mean "debtor in possession," and that the rule applied in the Second, Third, Ninth and Tenth Circuits is contrary to the plain language of Section 546(a).

In sum, allowing the existing conflict to continue undermines the fair administration of the law by allowing geography alone to decide the outcome of cases involving millions of dollars. Respondent merely points out the obvious —the number of cases is finite and shrinking. The same is unquestionably true in *O'Gilvie v. United States*, Nos. 95-966 & 977 (argued Oct. 9, 1996), but that has not deterred this Court from resolving the circuit conflict presented in that case where the statute has been amended to eliminate the issue completely in future cases. By contrast, here, a decision by this Court concerning the proper interpretation of the word "trustee" not only will resolve an issue that affects potentially thousands of cases now pending, but also will have prospective significance. Accordingly, the Court should decide the question presented here, both to resolve the pre-amendment conflict among the circuits and to provide guidance to courts deciding post-amendment cases as to whether the term "trustee" should be construed literally, as petitioner urges and two courts of appeals have held, or functionally, as four circuits have concluded.

CONCLUSION

For the foregoing reasons, and those stated in the petition, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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